UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/803
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 803

Case No. 897: ASAMOAH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 22 November 1995, George Asamoah, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(a) To rule that the Applicant's entitlement to non-local benefits has to be derived from his place of residence at the time of recruitment and not by the post for which he was first recruited.

...

(c) To rule further that staff rule 105.3(d) is applicable to the determination of the country of home leave of the Applicant.

(d) To decide further that, in application of staff rule 105.3(d), Ghana is the country of home leave of the Applicant.

(e) To rule that the Applicant be reinstated fully in his rights as a non-locally recruited staff member with retroactive effect of 1 April 1994.

(f) To order that, as compensation for both the injury sustained by the Applicant, and the financial

losses incurred owing to withheld international benefits, a sum of US$20,000.00 (twenty thousand US dollars) be paid to the Applicant."

Whereas the Respondent filed his answer on 1 July 1996;

Whereas the Applicant filed written observations on 26 July 1996;

Whereas, on 4 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 12 and 14 November 1996;

Whereas, on 15 November 1996, the Applicant filed comments to the statements provided by the Respondent on 12 November 1996;

Whereas the facts in the case are as follows:

The Applicant, a national of Ghana, entered the service of the United Nations Office at Geneva (UNOG) on 4 August 1980, as a Finance Clerk in the Division of Administration, Payroll Unit, on a one-year, fixed-term appointment at the G-3, step II level. Neither his initial Letter of Appointment nor his initial Personnel Action Form make any mention of his status as a local or non-local recruit. His Personnel Action Form states that his country of nationality is Ghana and that he was recruited from Annecy, France. A Personnel Action Form dated 18 January 1994, states that, as of 1 January 1994, the Applicant's status would be corrected from non-local to local. The Applicant's appointment was subsequently extended through 31 December 1996.

During his service with UNOG, the Applicant received successive promotions to the G-4 and to the G-5, step XI level, with effect from 1 April 1982 and 1 January 1993, respectively. On 1 October 1993, the Applicant became Accounting Clerk (Audit & Termination). From 5 June 1993, he was temporarily assigned for a period of six months to Haiti with MICIVIH.

On 7 December 1983, the Chief, Personnel Administration Section, informed the Applicant that UNOG would proceed to correct

the Applicant's status from non-local to local recruit, on the ground that a mistake had been made by the UNOG Recruitment Section at the time of the Applicant's appointment. This letter also pointed out that the offer of appointment dated 30 July 1980, which the Applicant had accepted on 4 August 1980, did not mention that his appointment would be on a non-local basis.

On 29 March 1984, the Applicant requested administrative review of this decision.

In a memorandum dated 25 May 1984, the Chief, Personnel Service, informed the Chief, Administrative Review Unit, Office of Personnel Service, at Headquarters, that the Applicant's case had been reviewed and that the decision to change his recruitment status would be upheld. The Chief, Personnel Service, explained that, initially, the Applicant had been correctly reported as recruited on a local basis, but that later, his status had been incorrectly modified by a recruitment officer who added "on a non-local basis" in an internal document.

However, no action was taken during the subsequent ten years to correct the Applicant's status.

In a memorandum dated 14 January 1994, the Chief of the Personnel Administration Section at UNOG informed the Applicant that the Administration would proceed to correct, with effect from 1 January 1994, the Applicant's status from non-local to local recruit, for the reasons set out in the memorandum of 7 December 1983.

On 19 April 1994, the Applicant requested a review of this decision. On 26 July 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 27 July 1995. Its considerations, conclusion and recommendations read, in part, as follows:

"26. ... the Panel concluded that the initial grant of the non-local status to the Appellant was the result of an administrative error. After careful review of similar cases (General Services staff recruited at the same time, beyond the radius of 25 kilometers and of another nationality than the Swiss nationality who were granted local status because of the position they were to fulfil), the Panel found that, considering the category of post incumbered by the Appellant, the absence of any reference to the local/non local status of the Appellant on his letter of offer was to be interpreted as including him in the broad category of General Services staff who are normally recruited on a local basis in accordance with Staff Rules, Appendix B.

27. However, considering the number of years elapsed since the mistake was made and since it was first discovered by the Administration, the Panel was of the opinion that it would be extremely harsh to recover undue international benefits from the Appellant. In that regard, the Panel fully agreed with the statement made on 10 March 1994 by the Chief, Rules and Personnel Manual Section, in reply to the query made by the Chief, Personnel Service on 14 February 1994, who rightly underlined that 'by its own failure to take action, therefore, and by continuing to authorize, year after year, such benefits as home leave and education grant, in [her] view the Organization is estopped from recovering back to 1984 (...) given the multiplicity of the administrative errors in this case and the numerous occasions since 1984 when the Administration should have detected the absence of conformity of the payments with the Staff Rules, and given the fact that the staff member is a G-3, a waiver of even the two years' recovery may be justified'.

28. The Panel was also of the opinion that such a case could be avoided, had the Administration developed a stricter policy of checking the personal files anytime an administrative action has to be taken. The Panel suggested that clear and complete guidelines be set up, especially with respect to categories of posts to which non-local status may be granted, in order to avoid the recurrence of similar cases.

Conclusion and Recommendations

29. The Panel concludes that the Administration has acted in accordance with the relevant rules and procedures of the Organization in correcting the Appellant's status from non-local to local.

30. Nevertheless, the Panel strongly recommends that the Organization refrains from recovering unduly received international benefits for the reasons stated here above. The Panel further recommends that the Organization establish comprehensive and strict guidelines with regard to recruitment procedures.

31. In view of the above, the Panel makes no recommendation in support of the appeal."

On 20 September 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Panel's report which concludes that the correction of an error did not violate your rights as a staff member and has recommended that there be no recovery of benefits obtained by you as a result of the initial administrative error.

The Secretary-General agrees with the Panel's recommendations and has decided that no recovery of benefits obtained by you as an internationally recruited staff member shall take place. The Secretary-General has also decided that the effective date of change of your status shall be 1 April 1994, instead of 1 January 1994."

On 22 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The criterion for determination of entitlement to non-local recruitment status is the place of the Applicant's residence at the time of his recruitment, rather than the nature of the post for which he was recruited.

2. The granting of international benefits to the Applicant at the time of his recruitment was in accordance with the relevant Staff Rules and Regulations.

Whereas the Respondent's principal contentions are:

1. Staff members of the General Service category are normally locally recruited. Appendix B to the Staff Rules permits non-local recruitment only in defined circumstances. The Applicant's recruitment did not meet those criteria.

2. Retroactive correction of an error does not violate the Applicant's rights.

The Tribunal, having deliberated from 5 to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent, dated 20 September 1995, accepting a unanimous Joint Appeals Board (JAB) recommendation, dated 27 July 1995, that the Administration had acted in conformity with the relevant rules and procedures of the Organization in correcting the Applicant's status from non-local to local.

II. Appendix B of the Staff Rules defines a locally-recruited staff member as one in the General Services category who, at the time of his appointment, was either a Swiss national or resident within a 25 kilometre radius of the Palais des Nations. The Applicant, who is not a Swiss national, was employed as a Finance Clerk at UNOG and resided more than 25 kilometres from the Palais des Nations when he was recruited. He was appointed on 4 August 1980 as a non-local recruit. The Applicant contends that, given the foregoing facts concerning his nationality and residence, he was properly appointed with non-local status pursuant to Appendix B to the Staff Rules. In contrast, the Respondent contends that it would be unreasonable, simply because the Staff Rules provide that a locally recruited official is one who resides within 25 kilometres of the Palais des Nations, to interpret the Rules as requiring that

the Respondent pay international benefits to a staff member not so residing. Further, the Respondent argues that the provisions of the Staff Regulations governing General Service staff focus on the type of skills needed for a post rather than on the address of the successful applicant at the time of his recruitment; he refers to Annex 1, paragraph 6 of the Staff Regulations, which provides that the salary scales of staff in the General Service and related categories are fixed by reference to best prevailing local rates. The Respondent explains that the Applicant was initially given non-local status due to a simple administrative error in an internal document known as a "check-list". The Respondent cites a Referral Sheet, dated 14 November 1983, from the Chief, Personnel Service, that points out that Finance Clerks are not among the category of staff who may be recruited on non-local basis.

III. The Respondent states that UNOG's practice when filling General Service positions, such as the Applicant's, is not to bar candidates simply because they reside more than 25 kilometres from the Palais des Nations. If the selected candidate accepts such a position and commutes more than 25 kilometres from his residence, the candidate will still be recruited "locally" since he is encumbering a local post. The Respondent also points out that the employment contract of any General Service candidate not recruited locally will explicitly describe the new employee's recruitment status, since non-local status is an exception to the General Service category's normal recruitment procedures. The employment contract is signed by the Applicant and his signature is evidence of his acceptance of the terms of his employment. The Respondent refers to the JAB's finding that the absence of any reference to the Applicant's local/non-local status in the offer of employment made to the Applicant should be interpreted to include him in the broad category of General Service staff, who are normally recruited on a local basis in accordance with Appendix B of the Staff Rules.

IV. The Applicant contends that this argument shows a confusion on the Respondent's part between the status of a staff member and the attributes of the post. In support of his case, the Applicant refers to UNAT Judgement No. 508, Rosetti (1991), which, in referring to conditions for international recruitment of a General Service category staff member, says that the relevant condition is that they have been "recruited from outside the area of the duty station". The Applicant also refers to the statement in the judgement that "the Tribunal considers that whether a staff member is entitled to the allowances or benefits in question is determined by the staff member's place of recruitment and not by the post occupied by him or her".

V. The Tribunal sympathizes with the Applicant's position and understands why he pursues this appeal. The words of Appendix B of the Staff Rules are perfectly clear and, taken on their own, support the Applicant's argument that, because he was a non-Swiss national residing, at the time of his appointment, more than 25 kilometres from the Palais des Nations, he is entitled to non-local status.

The Tribunal believes, however, that the Staff Regulations and the recruitment practices referred to above must also be taken into consideration. In addition, it is clear that the Applicant's current situation results from the error made in the relevant employment documentation at the time of his recruitment, and that the Organization never intended that he be recruited internationally.

The Tribunal has examined the Respondent's submissions concerning the policy governing General Service recruitment and believes such policy to be that the skills needed for a post, rather than the address at the time of the Applicant selected for that post, is the determining factor in the assessment of the employee's status. There is no reason to doubt the Respondent's statement that

the skills of the post at issue here did not necessitate international recruitment.

VI. The Tribunal has considered the Applicant's argument concerning Rosetti. However, in Rosetti, the Applicant had been properly recruited to a position reserved for international recruitment, since that position required special skills, and was later transferred to a post that was not so reserved. On these facts, the Tribunal indicated that Ms. Rosetti could not be deprived of her properly acquired status as an international recruit. In the present case, it is clear that the Applicant's non-local status was not properly acquired but rather acquired in error.

Judgement No. 612, Burnett (1993), differs from the present case. In Burnett, staff were recruited internationally for the same position for which the Applicant Burnett had been recruited locally, whereas in the present case, there is no evidence that staff were recruited internationally for positions such as the Applicant's. The Tribunal concludes that the Applicant has not established that he was properly given international status.

VII. However, the Tribunal notes that due to an error on the part of the Administration, the Applicant has been treated as an international recruit since 1980. The Administration discovered its error as early as 1983, and yet it allowed the situation to continue. Indeed, no further action was taken until 1994. In response to a question posed by the Tribunal concerning the Respondent's delay in remedying the error, the Respondent could not provide an explanation. The Tribunal believes that it would be unjust and inequitable if the benefits accruing to the Applicant as a result of this error, which continued uncorrected by the Administration, were now to be terminated. Had the mistake been corrected when it was discovered in 1983, the situation would have been different. However, the Administration allowed an egregious

amount of time to elapse before attempting to correct the error and is unable to offer any explanation for its delay. Given the foregoing, the Tribunal finds that the Applicant reasonably relied on the Administration's inaction as a tacit acknowledgment that the Applicant had properly been given international status. Therefore, to terminate the Applicant's benefits at this point would result in a severe and unacceptable penalty for the Applicant, since the benefits at issue arise from an error that was negligently not addressed by the Administration and, further, was not of the Applicant's making.

VIII. The Tribunal, therefore, orders that the Applicant should continue to be treated as having international status with respect to the benefits accruing therefrom. The Tribunal further orders that the Applicant's benefits should be reinstated with effect from the date on which they were suspended.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/804
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 804

Case No. 898: ABOURA

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Mr. Samar Sen, President; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 12 November 1995, Mohammed Thahim Aboura, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal to:

"i. Reinstat[e] Applicant to duty with effect from his release from military service, and consider the period of cessation as special leave with full pay.

ii. In the absence of reinstatement by the Respondent because of the disability and medical unfitness of the Applicant to work as a Teacher, order the Respondent to pay Applicant the difference between the indemnity of termination between disability and 'non availability'.

iii. Payment of secretarial and legal counselling fees estimated at US$700."

Whereas the Respondent filed his answer on 14 May 1996;

Whereas the Applicant filed written observations on 26 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 21 October 1985, as a "D" Teacher at the Khalsa School in the Syrian Arab Republic (SAR) at the grade 6, step VII level, on a probationary one-year appointment. His Letter of Appointment stated, as a special condition, that:

> "...
>
> (b) "The undertaking signed by you in respect of military service on 15.10.85 forms a part and parcel of this Letter of Appointment".

The undertaking was that, in case the Applicant were called for military service, the Agency would not be obliged to keep his post open during his absence.

In early March 1990, the Applicant advised the Area Officer, Damascus, that he was required to report for military service on 1 April 1990. On 5 March 1990, the Field Personnel Officer wrote to the Applicant and advised him that, in accordance with the Agency's policy in relation to staff members who are absent from their posts due to military service, the Applicant had two choices. The first was to apply for special leave without pay from 1 April 1990, up to a maximum of two and a half years (Option A), or, alternatively, to have his services terminated for non-availability for service, with effect from 30 April 1990 (Option B). If the Applicant chose Option B, he would be "paid salary in cash in lieu of 30 days notice of termination in addition to ... separation benefits and a Termination Indemnity under Area staff regulation 9.1 and Area staff rule 109.9". Should the Applicant choose Option B:

> "[T]here will be no commitment on the part of the Agency to re-employ you; therefore, if and when you apply for re-employment with the Agency in future, consideration of your re-employment shall be the subject to the availability of vacant posts ... and shall be based on your suitability ... for the respective post".

The Applicant submitted his resignation on 16 April 1990, citing his induction into military service. The Agency treated the Applicant's letter of 16 April 1990 as being a choice by the Applicant of termination for non-availability for service (Option B) and not a resignation or a request for special leave without pay (Option A). The Applicant's separation benefits were calculated and paid accordingly, with termination to take effect from 15 May 1990, due to the Applicant's non-availability for service.

On 16 April 1990, the Applicant signed an Employee Clearance Certificate and, on 9 July 1990, he requested a certificate of service. A certificate of service, dated 15 July 1990, was provided and stated that the Applicant's reason for leaving the Agency was "termination for non-availability for service".

On 25 June 1990, the Applicant wrote to the Deputy Director of UNRWA Affairs, SAR, stating that he had contracted an illness of the pharynx during his teaching service with the Agency in 1989 and that, on 1 June 1990, he had been "discharged from military service on medical grounds for the same illness". He requested to be examined by a medical board to determine his fitness for service, so that, if "found unfit, especially that my sickness is attributed to work", he could receive "termination benefits on medical grounds".

On 21 August 1990, the Field Personnel Officer, SAR, asked the Field Health Officer, SAR, whether, based on the Applicant's medical history, reference to a medical board was warranted. On 25 August 1990, the Field Health Officer, SAR, advised the Field Personnel Officer, SAR, that an audiogram test performed on 14 March 1990 indicated that the Applicant had a "severe neurosensory hearing defect in his right ear". Also, a specialist who had examined the Applicant on 10 March 1990 found that the Applicant had "Menier's disease". On that basis, the Field Health Officer, SAR, believed that the Applicant's "health status may justify referring him to be examined by a medical board".

On 6 October 1990, the Field Health Officer was requested to convene a medical board:

> "to determine whether or not [the Applicant's] illness is attributable to his service with the Agency, the degree of disability, whether it is permanent or temporary, and whether it hinders him from performing the duties of a teacher".

After examining the Applicant, the Board concluded as follows:

> "The staff member is unfit for performing his duties as a teacher, but he is able to perform other administrative duties. His illness is not attributable to his service with the Agency".

On 22 November 1990, the Applicant wrote to the Area Officer, Damascus, asking to be re-employed following his release from military service.

In a reply dated 16 December 1990, the Field Personnel Officer advised the Applicant as follows:

> "Please be advised that the Medical Board which examined you on 8 November 1990 has decided that you are unfit for performing the duties of a teacher, but you are able to perform administrative duties, and that your illness was not attributable to your service with the Agency.
>
> In view of the above and as your services with the Agency had already been terminated due to non-availability for service, your request mentioned above cannot unfortunately be acceded to.
>
> Should you wish to be re-employed by the Agency, you shall have to apply in response to vacancy notices for suitable posts, excluding teacher posts, and your application shall be considered along with other applications in accordance with the established norms, procedures and requirements of employment in the Agency."

On 6 November 1994, the Applicant wrote to the Director of UNRWA Affairs, SAR (the Field Director) again requesting that he be reinstated into the Agency's service. On 20 November 1994, the

Officer-in-Charge, Personnel Division, SAR, replied, on behalf of the Field Director, as follows:

> "Having studied your request carefully and reviewed your personal file, I regret to advise that the Agency cannot satisfy your request, because the Medical Board which examined you on 8 November 1990, upon your request, declared you 'unfit for performing the duties of a teacher, but able to perform administrative duties ...'
>
> Though the Medical Board conclusion does not militate against your employment in administrative posts, I feel that if you would wish to apply for such posts your chances for re-employment would be so meagre in view of your lack of administrative and clerical experience and your past record of service, which is completely discouraging, for the Agency to have you re-employed".

On 30 November 1994, the Applicant again wrote to the Field Director requesting reinstatement into the Agency's service. In a reply dated 6 December 1994, the Field Director stated that he had investigated the matter personally and that, in view of the background reports in the Applicant's file documenting incidents of unauthorized absence and low quality of performance, he was unable to accede to the Applicant's request for reinstatement.

On 5 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB) seeking reinstatement into the service of the Agency, retroactive to the date when he had first applied for reinstatement.

The JAB adopted its report on 14 July 1995. Its findings, evaluation and judgement read as follows:

> "III. BOARD FINDINGS, EVALUATION AND JUDGEMENT
>
> 23. In its deliberations, the Board considered all documents cited before it, including the Appellant's personal file, and came out with the following:
>
> a. When he joined the Agency, the Appellant signed an acknowledgement that the Agency would not keep his post open if he was called for military service.

b. On 5 March 1990, the Appellant was given a letter by the Field Personnel Officer which clearly states that, if he was called to military service and chose to have his appointment with the Agency terminated due to his non-availability instead of requesting a period of special leave without pay and returning to the Agency within a specified period of time, there was no commitment on the part of the Agency to re-employ him, and if he wished to seek re-employment it would be in accordance with normal Agency procedures for filling vacant posts, including competition with applicants.

c. The Appellant submitted his resignation on 16 April 1990 due to his induction into military service and, therefore, his services with the Agency were terminated due to non-availability for service.

d. After his release from military service on medical grounds, the Appellant requested referral to a medical board to determine whether his illness was attributable to his service with the Agency.

e. On 8 November 1990, the Medical Board which examined the Appellant concluded that he was unfit for service as a teacher but was able to perform administrative duties. The Board also concluded that the Appellant's illness was not attributable to his service with the Agency.

The Appellant then requested re-employment with the Agency on 22 November 1990, but was informed by the Field Personnel Officer in his letter dated 16 December 1990 that he should apply in response to vacancy notices for suitable posts, excluding teacher posts. The Field Personnel Officer also conveyed the conclusions of the Medical Board in the said letter.

The Appellant waited until 6 November 1994 to reiterate his request for re-employment with the Agency, a request that was declined on 20 November 1994 by the Officer-in-Charge, Personnel Division.

The Appellant submitted his appeal to the Board on 5 January 1995.

Based on the above findings and by reference to Area staff regulation 11.1(A) and Area staff rule 111.3 governing appeals, appeal procedures and time limits, the Board resolved that:

The Administration has dealt with the Appellant's case in conformity with standing rules and has properly applied its policy concerning staff members who join military service to the Appellant.

The Board could not establish that the Administration's decision was motivated by prejudice or any other extraneous factors.

The Board is also of the opinion that the Appellant's case does not invoke the competence of the Board due to the long lapse of time between the date of the Appellant's separation from the Agency's service and first request for re-employment in 1990 on the one hand, and the date of his second request for re-employment on the other.

RECOMMENDATION

In view of the foregoing, and without prejudice to any further oral or written submission to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation to hold the administrative decision appealed against; and that the case be rejected."

On 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB's report and informed him as follows:

"... You will note that the Board found that the Administration had acted in conformity with its standing rules and properly applied its policy concerning staff members who join military service in this case, and further that your appeal did not invoke the competence of the Board due to the long lapse of time between your requests for re-employment and the institution of your appeal.

I have carefully reviewed the Board's report and agree with its conclusions and recommendations. Your appeal is therefore dismissed."

On 12 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant is entitled to a termination indemnity for disability as he was unfit to continue as a Teacher prior to his termination for non-availability for service.

Whereas the Respondent's principal contentions are:

1. The application should not be received due to an unreasonable delay by the Applicant.

2. The Applicant has no right to reinstatement.

3. The Applicant was not incapacitated for further service with the Agency at the date of termination.

The Tribunal, having deliberated from 22 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant separated from service with UNRWA in 1990, because he was inducted into military service. Shortly thereafter, he was discharged from military service on medical grounds, due to a condition that he claimed arose during his UNRWA service. The Applicant then requested a medical board examination because he asserted that his condition was due to a disease he had contracted during his service with UNRWA. The Medical Board determined that his illness was not attributable to service. It further determined that the Applicant was physically unfit to perform the duties of a Teacher but could perform administrative duties despite his medical condition.

II. In 1990, and again in 1994, the Applicant unsuccessfully requested reinstatement in UNRWA but no job could be found for him. In this appeal, the Applicant seeks reinstatement, or, alternatively, the payment of disability benefits. The Joint Appeals Board (JAB) determined that the Applicant's case was not

receivable due to the long lapse of time between the Applicant's separation from service and his initial request for reinstatement in 1990, and his second request and appeal in 1994. The Tribunal has not found any convincing explanation for this delay of nearly four years. The JAB further noted that the Agency had properly applied its rules and policy concerning staff members who are inducted into military service. There was no finding of prejudice or other extraneous factors in the application of the rules and policy.

III. While the Tribunal is sympathetic to the difficulties which the Applicant has faced, it can find no basis on which to grant him relief. His medical condition was found to be not attributable to service. His separation was not for reasons of health and was not initiated by the Agency. Hence, he had no right to reinstatement.

IV. For the foregoing reasons, the Tribunal rejects all the Applicant's pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
President

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

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AT/DEC/805
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 805

Case No. 899: EL AOUFI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Lalla Boudour El Aoufi, a former staff member of the United Nations Population Fund (hereinafter referred to as UNFPA), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 August and 30 November 1994, 28 February, 31 May, 31 August and 30 November 1995, the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 November 1995, the Applicant filed an application, requesting the Tribunal:

"1. To find that:

(a) The Respondent's decision not to extend her appointment was based on the prejudiced evaluation of her performance prepared by the Deputy-Chief of the Division for the Arab States and Europe, ...

(b) The Respondent, in rejecting the findings and recommendations of the Ombudsman Panel and the JAB [Joint Appeals Board] Panel, denied the Applicant proper redress through a procedure he has himself established.

(c) The Respondent denied the Applicant due process rights ...:

(i) By failing to respect both the form and purpose of the performance evaluation system: ...

(ii) The Rebuttal Panel was given false information on an essential issue, [and] was not given sufficient time by the Administration to investigate the matter fully and fairly;

(iii) The special UNFPA Ad Hoc Investigative Panel set up to hear the charges of sexual harassment wrongly refused to consider vital evidence in the case ...

2. ... to reinstate the Applicant as of 17 July 1992, or, in the alternative, to see that she is offered a two year contract in an environment in which she can be judged on the basis of her work alone, as recommended by the Ombudsman Panel.

3. ...

(a) To remove the invalid PER [performance evaluation report] from the personnel file;

(b) To pay the Applicant compensation equal to nine months' net base salary, for the violation of the PER rules;

(c) To order that an independent panel be established to investigate the sexual harassment aspect of the case, an aspect not considered by the JAB ...

4. ... that the Tribunal also award the Applicant an additional two years' net salary, for violation of her right to due process in both the rebuttal panel procedure and before the UNFPA administration Ad Hoc Investigative Panel."

Whereas, the Respondent filed his answer on 26 February 1996;

Whereas the Applicant filed written observations on 22 October 1996;

Whereas, the facts in the case are as follows:

The Applicant entered the service of UNFPA on 18 March 1989, on a one-year fixed-term contract as a Programme Officer at the P-3, step 7 level in the Division for Arab States and European

Programmes. Her appointment was extended for two years, until 17 March 1992. The Applicant's appointment was further extended until 17 May 1992 and, thereafter, until 17 July 1992, when she separated from service.

There was no evaluation of the Applicant's performance during her first year of service. On 12 February 1992, the Applicant signed her performance appraisal review (PAR) for the year 1991. In comments attached thereto, she contested the rating of her performance as "5" ("unsatisfactory") and requested an "immediate transfer to another UNFPA division". On 24 February 1992, the Applicant signed a Performance Review and Staff Development Report (PR), covering the period from 20 March 1989 to 9 July 1990. The report concluded that the Applicant was "a staff member whose performance does not meet expected standards in all respects".

By a letter from the Chief, Personnel Branch, UNFPA, dated 20 March 1992, the Applicant was informed that, in light of her "unsatisfactory performance", it was not UNFPA's intention to continue her employment, but that she was granted a grace period until 17 May 1992, to enable her to conclude her responsibilities. In a reply of the same day, the Applicant gave formal notice to the Deputy Executive Director (Programme), UNFPA, of her recourse against the decision to terminate her services. By a letter dated 16 April 1992 to the Administrator, UNDP, the Applicant requested administrative review and rescission of the decision to separate her from service. The Applicant submitted a formal rebuttal to her 1991 PAR to the Director, Division of Personnel on 6 May 1992.

In a memorandum to the Applicant dated 12 May 1992, the Chief of the Legal Section of the Division of Personnel, UNDP, stated that the decision to separate her from service would be maintained, in view, inter alia, of the fact that 'an internal inquiry on your allegation of prejudice or improper motivation by your superior has not revealed any evidence supporting your claim'.

On 12 May 1992, the Applicant requested, in accordance with staff rule 111.2(f), a summary hearing by the Joint Appeals Board (JAB) to recommend the suspension of action to separate her, pending completion of the rebuttal process. She noted that a rebuttal panel had not been established in her case.

An Ombudsman Panel was convened to review the issue of the Applicant's performance evaluations. In its report dated 14 May 1992, the Ombudsman Panel noted that "because performance-related discussions were not held with her during the first year, and because she was given the maximum possible extension after 12 months of service, the Panel feels that a very legitimate case exists for the staff member to have assumed that her performance had been at least satisfactory." The Ombudsman Panel went on to recommend that the Applicant "be moved to a different division in UNFPA, under a different supervisor, that she be given an additional one-year contract ... and that her performance be assessed at the end of the proposed one-year extension." The Panel felt that this was the fairest solution since it believed that "[the Applicant] is being penalized because deadlines for reporting procedures during her first two years with UNFPA were not observed by management."

On 14 May 1992, the JAB Panel held a summary hearing on the Applicant's request for suspension of action. In the proceedings before the JAB, the Ombudsman Panel Member who had reviewed the case in depth testified that the Applicant's file contained no written evaluation of her work expressing any dissatisfaction with her performance during her first two years with UNFPA. In its report of 15 May 1992, the JAB unanimously agreed on its conclusions, which read in part as follows:

> "(b) There was sufficient reason to warrant awaiting the outcome of the rebuttal process which would include an investigation of the allegation that the performance evaluation on which the decision not to renew the Appellant's contract may not have been based on

objective criteria but on improper considerations, as a result of professional and sexual harassment of the Appellant by her supervisor.

(c) Without going into the substance of the issues at this stage, in the view of the Panel, the Appellant would suffer irreparable damage if she were separated before the rebuttal proceedings were completed. The Panel understands that proceedings have begun and that there is therefore no reason why they should not be completed without undue delay.

(d) The damage Appellant could suffer would not be limited to procedural handicaps in pursuing her claim for rebuttal, but lies in the vast difference in her chances for obtaining complete satisfaction should she prove successful. If still in service, she would, no doubt, continue to serve under appropriate formal arrangements. If no longer in service, she might have to embark on the pursuit of her claim before other organs, including the UNAT [United Nations Administrative Tribunal] and even then the likelihood of reinstatement or reemployment rather than monetary compensation is limited."

The JAB, therefore, unanimously recommended that the request for the suspension of action be granted.

On 20 May 1992, the Secretary-General informed the Applicant of his approval of the JAB's recommendation to extend her appointment for two months in order to enable the Rebuttal Panel to complete its investigation.

The Rebuttal Panel held a number of hearings in which 15 witnesses, including the Applicant, testified. In its report of 10 July 1992, the Rebuttal Panel, which examined both the Applicant's PAR and PR, unanimously concluded that the evaluation process "was conducted in a fair and appropriate manner and that the supervisor's appraisal was based on an objective assessment of the staff member's performance and was rendered without bias". The Rebuttal Panel was also satisfied that the Applicant had received reasonable coaching, training and supervision, as well as oral warning of her poor performance.

Also, an ad hoc panel (the Ad Hoc Panel) was convened by the Executive Director of UNFPA to investigate the Applicant's charge of sexual harassment. It commenced its duties on 6 July 1992 and finished its investigations on 31 July 1992. In its report dated 31 July 1992, the Ad Hoc Panel found "no evidence whatsoever to substantiate any of the Applicant's allegations regarding sexual harassment by [the Deputy Chief, Division for Arab States and Europe]." On 4 August 1993, the Applicant submitted comments on the Report of the Ad Hoc Panel, noting its "serious inaccuracies".

The JAB adopted its report on 5 October 1993. Its considerations, findings and recommendations read as follows:

"Considerations

A - Performance

...

17. ... the Ombudsman Panel Member who had reviewed the case in depth testified that there was no written evaluation of [the Applicant's] performance in the file of [the Applicant] during the first two years with UNFPA alleging any dissatisfaction with the Applicant's work. Furthermore, the Ombudsman Panel found that there had been professional harassment by [the Deputy Chief, Division for Arab States and Europe] of the Applicant, which was witnessed by former staff members of DTCD [Department of Technical Co-operation for Development] who had professional dealings with UNFPA. [The Ombudsman Panel Member who had reviewed the case in depth] felt that there was personnel mismanagement and recommended that the Applicant be moved to a different division in UNFPA, that she be given an additional one year contract, and that her performance be assessed at the end of the proposed one year extension. The Panel also noted [the Coordinator's, UNDP/UNFPA Ombudsman Panel] statement that there were no guidelines on sexual harassment and that he had proposed that an independent panel write guidelines on sexual harassment.

The Panel proceeded to consider whether the Applicant had received sufficient coaching, training, and supervision. The Representative of the Secretary-General asserted that the Rebuttal Panel had decided that the Applicant had received reasonable coaching, training and supervision, and that she

also had received oral warnings of her poor performance on various occasions from several levels of management. However, the Applicant had not been receptive to efforts by her supervisors. The Applicant's output in terms of both quality and quantity was unsatisfactory.

[The Deputy Chief, Division for Arab States and Europe] contended that the reason why no written statements were put in the Applicant's file was because they would impair the staff member's mental outlook and block the incentive to improvement. He also stated that he did not harass the Applicant sexually or professionally.

[The Chief, Division for Arab States and Europe] stated that he was aware of the Applicant's poor performance. For example, during his trip to Morocco, he had repeatedly asked the Applicant to submit a project and there was no action by the Applicant. She had told him that she did not have time to do it. He had discussed with her the possibility that because of her performance her home-leave might not be granted. However, eventually he did approve the Applicant's home-leave in December 1992.

Counsel for the Applicant pointed out that, in December 1992, when the home-leave was authorized, [the] Applicant had less than six months of anticipated future service by the time she was to take it in February/March 1993. Under the Staff Rules, no home-leave should therefore have been granted, unless it was anticipated that the contract was to be renewed.

The Representative of the Secretary-General pointed out that, under staff rule 111.2(k), in the case of termination or other action on grounds of inefficiency, the Panel should not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor.

The Applicant's counsel pointed out that there was a serious problem of lack of communication, which was noted by the Rebuttal Panel, in connection with the purchase of supplementary vehicles. That Project was bounced back and forth between the Applicant, [the Deputy Chief, Division for Arab States and Europe], and [the Chief, Division for Arab States and Europe]. According to the Applicant's counsel, the Rebuttal Panel considered as key evidence against [the Applicant], the letter concerning a conversation with [a staff member of DTCD] regarding allocation of funds for the

supplementary vehicles. On that subject, [the Chief, Division for Arab States and Europe] contended that he had told [the Applicant] to cancel the purchase of the two vehicles immediately and that the Applicant maintained that she had acted promptly. In support of his contention that she had failed to do so, [the Chief, Division for Arab States and Europe] asserted that the cancellation did not arrive until after the purchase had already been made.

The Applicant's counsel contended that a memorandum concerning the utilization of savings for the buying of the vehicles (...), and a memorandum referring to a sufficient amount in the budget, specifically stating that amount to be $25,000 (...), implied agreement to go ahead with the purchase of the vehicles.

The Applicant's counsel further contended that documents submitted to the Rebuttal Panel by [the Deputy Chief, Division for Arab States and Europe] were not copies of the 'prefilleds' the Applicant actually submitted, that [the Deputy Chief, Division for Arab States and Europe] had erased the Applicant's comments, date, and initials on certain documents to support his allegations that he had done the work (...). [The Deputy Chief, Division for Arab States and Europe] submitted documents to refute the Applicant's assertion. The Panel did not find that there was sufficient evidence to show that the original documents had been altered.

[The] Applicant's counsel submitted that, since her client was not represented by counsel before the Rebuttal Panel, the Applicant did not get due process. Moreover, the Rebuttal Panel had made serious mistakes of fact.

The Panel considered that there were deficiencies in the reporting procedures, both formal and informal. There was evidence of mismanagement at the higher levels which resulted in a lack of clarity as to whether there was an implied authorization by superior to junior officers to take certain actions which later became the subject of dispute.

B - Sexual harassment

The Panel denied the Respondent's request that the report of the Ad Hoc Panel on the allegations of sexual harassment, which was made available on a confidential basis to the JAB, should not be released to the Applicant. As the rules demanded that anything revealed to one party must also

be made available to the other party, the Panel could not accept that condition. However, it agreed to ask the Applicant and her counsel to ensure that the report would be made available only for the purpose of these proceedings. The latter gave that assurance.

The Panel noted the Applicant's request to the JAB to take into consideration the composition and manner of the Ad Hoc Panel's operation and it also took note of the Applicant's comments on the report of the Ad Hoc Panel. The Chairperson pointed out that this was the first time a JAB Panel was asked to deal with the substance of allegations of sexual harassment. While the JAB was competent to make appropriate recommendations, it could instead ask that an independent body investigate the matter.

The Panel considered that, in the present case, the Administration had failed in its obligation to provide proper and equitable procedures for the timely evaluation of the staff member's performance. The Administration did not complete a PER for the Applicant until she requested it. The Panel, therefore unanimously recommends that the Applicant's PER describing her services as unsatisfactory be removed from her file.

The Panel further recommends that Management, especially in PER evaluations, should follow strictly the rules applicable thereto.

The Panel unanimously recommends that the Applicant be paid compensation equal to nine months' net base salary for the violation of those rules.

As a fixed-term appointment carries no expectation of extension or conversion to another type of appointment, the Panel does not find it possible to recommend reinstatement of the Applicant and the extension of her contract, which she requested, in accordance with the suggestion by the Ombudsman Panel.

The Panel unanimously recommends that an independent Panel be established to investigate the sexual harassment aspect of the case."

On 18 February 1994, the then Under-Secretary-General for Administration and Management informed the Applicant as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that your fixed-term appointment carried no expectation of extension or conversion to another type of appointment and that it did not find it possible to recommend your reinstatement. The Secretary-General has accepted this conclusion.

Although the Secretary-General has noted the Board's conclusions and recommendations regarding the evaluation procedures, he has also given consideration to the report of the Performance Review Rebuttal Panel which reviewed documents and conducted interviews and found that the evaluation of your performance was conducted in a fair and appropriate manner and that the supervisor's appraisal was based on an objective assessment and was rendered without bias. The Secretary-General has also noted that there was no finding by the Joint Appeals Board that there was any bias on the part of the Rebuttal Panel. The Secretary-General has also reviewed the recommendations of the Ombudsman but has noted that the report of the Ombudsman was issued before the Rebuttal Panel made its findings of a fair performance evaluation.

The Secretary-General has also confirmed that you, as an UNFPA staff member, were indeed given early notice of the need to initiate the evaluation of your performance, in particular in UNFPA Circulars dated 27 November 1990 and 17 April 1991. In the light of these circumstances, the Secretary-General has decided not to remove the PAR in question from your file or to pay you compensation.

The Secretary-General has noted the Board's recommendation that an independent Panel be established to investigate your sexual harassment allegations. The Secretary-General has also noted that these allegations have already been reviewed by a special Ad Hoc Investigative Panel set up by the Executive Director of UNFPA and that the report of this Panel concluded that they found no evidence to substantiate any of your allegations. The Secretary-General takes allegations of this nature with extreme seriousness and has considered with care the report of the Ad Hoc Panel as well as your submission and that of your counsel to the Joint Appeals Board regarding this report. After giving full consideration to all factors, the Secretary-General has decided not to establish another investigative panel.

> The Secretary-General, having re-examined your case in the light of tne Board's report, has decided to maintain the contested decision and to take no further action on your case."

On 30 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend her appointment was vitiated by extraneous factors since it was based on a prejudiced evaluation of her performance.

2. The Respondent has denied the Applicant due process in the following ways: (a) by failing to respect the form and purpose of the performance evaluation system; (b) by failing to give the Rebuttal Panel sufficient time fully and fairly to investigate the issue of Applicant's performance evaluations and by presenting it with false information on an essential issue; and (c) by the refusal of the Ad Hoc Investigative Panel set up to hear the charges of sexual harassment to consider evidence presented by witnesses for the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment.

2. The decision not to renew the Applicant's fixed-term appointment was not vitiated by extraneous factors.

The Tribunal, having deliberated from 28 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant joined the United Nations Population Fund (UNFPA) in March 1989, on a one-year fixed-term contract, which was

extended for an additional two-year period. In March 1992, the Applicant was informed that UNFPA did not intend to renew her appointment, due to her unsatisfactory performance. In April 1992, the Applicant requested administrative review of this decision, contending that the evaluation of her performance which formed the basis of the decision had been prejudicial as she had been subjected to sexual harassment by her supervisor, whose advances she had rejected. The Applicant notes that the supervisor in question was the subject of a similar complaint by another staff member.

II. In July 1992, an ad hoc panel was constituted to investigate the allegation of sexual harassment. After interviewing 26 witnesses, the Ad Hoc Panel concluded that there was "no evidence whatsoever to substantiate the claims ... presented". The Applicant challenges the composition of this panel, which was constituted solely of members chosen by the Administration. The Applicant further contends that the panel wrongly refused to consider evidence presented by several witnesses for the Applicant, including evidence of contemporaneous accounts made by the Applicant to friends and other staff members of the alleged harassment.

III. A Rebuttal Panel, which had been constituted to examine the Applicant's rebuttal to her performance appraisal review (PAR) and Performance Review and Staff Development Report (PR), after hearing 15 witnesses, concluded that the Applicant's performance had been evaluated in a fair and appropriate manner, and was based on an objective assessment without bias. The Rebuttal Panel further concluded that the Applicant had received adequate coaching, training, and supervision and had been given oral warnings of her performance inadequacies. However, according to one of its members, the Rebuttal Panel's considerations were flawed by two important factors: the "serious doubts about the veracity of the statements made by [the Applicant]", doubts which eventually turned out to be

unfounded. According to that Rebuttal Panel member, had the Panel known the truth at the time of its hearings, it would have probably come to a different conclusion about the Applicant's veracity. Also, the time pressure put on the Panel to finish its deliberations by the end of the Applicant's extension adversely affected those deliberations.

IV. An Ombudsman Panel, which conducted an in-depth investigation in March 1992, found that the Applicant had not received the required periodic evaluation of her performance for her first year of service with UNFPA but that at the end of that year, her contract was renewed for the maximum period of two years. The Ombudsman Panel further found that at the end of her second year with UNFPA, the Applicant still had not been formally evaluated and that there was no indication in the file of any dissatisfaction by her supervisor with the Applicant's work. The supervisor had transferred to another office in July 1991, during the two years of the Applicant's extension.

V. The Respondent does not dispute that performance reviews of the Applicant were not conducted in a timely manner, as she was evaluated nearly two years after the performance period. However, the Respondent relies on the report's findings that the Applicant's performance was ranked as "somewhat below standard" for the period March 1989 to July 1990. The performance review covering the year 1991 ranked the Applicant's performance as "unsatisfactory". These ratings were reviewed and endorsed by the Management Review Group that recommended non-extension of the Applicant's appointment. The Respondent notes that, following investigation of the Applicant's allegation that this rating was based on personal prejudice relating to sexual harassment, the Rebuttal Panel upheld the rating as having been made "without bias".

VI. In considering the circumstances of this case, the JAB concluded that the Administration had failed in its obligation to provide timely performance evaluation of the Applicant. To compensate for this failure, the JAB recommended the award of nine months' salary to the Applicant. The JAB also recommended the removal of the PAR from the Applicant's file. With regard to the allegations of sexual harassment, the JAB noted the concerns raised by the Applicant relating to the composition of the Ad Hoc Panel to investigate the allegation, and to the manner in which that panel conducted its investigation. Rather than addressing these concerns itself, the JAB recommended that an independent panel be established to investigate the claim of sexual harassment.

VII. The Tribunal agrees with the JAB's finding that the Administration failed to adhere to performance evaluation procedures. Had these procedures been followed, the Applicant's first supervisor would have completed evaluations that would have been free from any possible bias relating to the allegation of sexual harassment. Moreover, the Applicant would have been on formal notice of any shortcomings in her performance and would have had an opportunity to address them through job training and other performance improvement opportunities.

VIII. The Applicant claims that an episode that took place in Damascus in 1989, which she alleges constituted sexual harassment, was connected with her non-renewal, as it resulted in a prejudicial appraisal of her performance by one of the supervisors involved in the sexual harassment episode.

On the basis of the record before the Tribunal, it is not possible to determine whether the Applicant was subjected to sexual harassment by her supervisor. Nor is it possible to ascertain

whether, if there was sexual harassment by the Applicant's supervisor, this influenced the performance evaluation of the Applicant by other supervisors.

IX. As the Tribunal has held, sexual harassment is a very serious offence and the Administration has a responsibility to investigate claims of sexual harassment promptly and effectively (Judgements No. 560, Claxton (1992) and No. 707, Belas Gianou (1995)). Such investigation is greatly obstructed by the failure of the Administration to adhere strictly to its performance evaluation procedures. These procedures serve as important safeguards against the introduction of prejudice and bias arising from sexual harassment or any other improper motivation.

X. Since the investigation of the Applicant's claim of sexual harassment, the Administration has introduced in ST/AI/379 of 29 October 1992, a policy on sexual harassment which includes procedures for the investigation of complaints. These procedures were not in place when the Applicant's claim was made. As a consequence, the investigation undertaken by the Administration did not fully conform to subsequently established procedures.

In view of the foregoing, the Tribunal finds that, in light of the procedural shortcomings in the performance evaluation process, the Applicant is entitled to compensation and further investigation of her claim regarding sexual harassment is warranted.

XI. For the foregoing reasons, the Tribunal orders that the Respondent:

(1) Remove the PAR and PR performance evaluation reports from the Applicant's file;

(2) Establish an independent panel, as set forth in ST/AI/379, to investigate the Applicant's claim of sexual harassment; and

(3) Pay the Applicant compensation equal to $15,000.00.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/806
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 806

Case No. 900: EL-HAJ

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry, Vice-President; Mr. Francis Spain;

Whereas, on 20 June 1995, Abdul Hadi Ibrahim El-Haj, a former area staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency) filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 September 1995, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

> "... I request UNAT [United Nations Administrative Tribunal] to reinstate me to service with full payment of all my dues and arrears related to my suspension period."

Whereas the Respondent filed his answer on 14 May 1996;

Whereas the Applicant filed written observations on 30 July 1996;

Whereas, on 26 October 1996, the Applicant filed an additional document with the Tribunal;

Whereas, on 28 October 1996, the Tribunal requested the Respondent to provide it with the answers to certain questions, which answers were provided on 31 October 1996;

Whereas, on 2 November 1996, the Applicant filed additional documents with the Tribunal;

Whereas, on 6 November 1996, the Respondent filed with the Tribunal a response to the Applicant's memorandum of 2 November 1996;

Whereas, on 15 November and 3 and 16 December 1996, the Applicant submitted additional documents to the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 17 October 1960, as a Teacher at the grade 5, step I level, in Gaza, on a probationary appointment. From 8 to 10 September 1962, the Applicant was suspended without pay under Area staff rule 110.1 for failure to observe the standards of official conduct as required under the Area Staff Rules. He received a written censure from the Acting Field Personnel Officer, UNRWA, Gaza, on 10 September 1962. The Applicant's periodic report for the period 17 October 1960 to 21 September 1961 rated him as "a staff member who maintains a good standard of efficiency". His periodic report for the next period, ending on 9 September 1962, rated him as "an unsatisfactory staff member". The Applicant's annual increment was deferred by letter dated 28 February 1963, from the Field Personnel Officer, Gaza. He was suspended for ten days for negligence in the performance of his duties, after having received two warnings. His periodic report for the period ending 1 July 1963 rated his performance "unsatisfactory". The Applicant was demoted from grade 5 to grade 3 from 1 September 1963 until 1st March 1964.

The Applicant's performance evaluation reports (PERs) for the years 1964 through 1972 rated him as "a staff member who maintains a good standard of efficiency". Effective 31 January 1973, the

Finance, Personnel and Administration (DFPA), UNFPA, some information in order to "correct errors of omission" in her 1993 PAR.

The Applicant, by a memorandum dated 31 May 1994, to the Director, DFPA/UNFPA, requested a formal rebuttal investigation of her 1993 PAR. In its report dated 24 August 1994, the Rebuttal Panel concluded that "there [was] insufficient evidence to support the rating assigned and unanimously recommend[ed] that the MRG upgrade the rating provid[ed] by the supervisor".

By a letter dated 10 October 1994, the Director, DFPA/UNFPA informed the Applicant that the MRG had reconvened to consider the Rebuttal Panel's report and determined that the report "did not provide sufficient basis to justify a change in the rating". Therefore, the rating of (4) would be retained. The letter also advised the Applicant that, because her services "ha[d] not in all respects met the standards and requirements of UNFPA, management ha[d] decided not to offer [her] a renewal of [her] fixed-term appointment".

On 26 October 1994, the Applicant lodged with the Joint Appeals Board (JAB) a request for suspension of action under staff rule 111.2(c), seeking to suspend the decision to separate her from the service of the Organization on 14 November 1994. On 10 November 1994, the JAB unanimously adopted its report and recommended "that the suspension of action requested be granted and that no action be taken to carry out the separation process until a decision is taken on the substance of the [Applicant's] appeal".

On 11 November 1994, the Under-Secretary-General for Administration and Management notified the Applicant as follows:

> "The Secretary-General has taken note of the Board's report and decided, taking into account the circumstances of your case, to approve the recommendation of the Panel with the understanding that your appointment will be extended through 14 February 1995 to enable the Joint Appeals Board Panel to submit its report on the substance of your appeal.

The Joint Appeals Board is being requested to submit its report on the substance of your appeal to the Secretary-General by 1 February 1995."

On 21 November 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 27 January 1995. Its considerations and recommendation read as follows:

Considerations

"...

31. The Panel carefully considered the Appellant's PARs for the years 1991, 1992 and 1993. The Panel observed that these appraisals contained many positive statements regarding the Appellant's character, her language skills, her conscientiousness and hard work, and her ability to work with people. Similar statements were found in letters submitted by the Appellant from several consultants. The Panel also observed, however, statements in the Appellant's PARs by two supervisors and the MRG regarding inadequacies in her substantive and technical work:

(a) In the 1991 PAR, the Appellant's supervisor, who is no longer with the United Nations, discussed the 'dilemma' in the evaluation field in 'balanc[ing] substantive expertise and evaluation and monitoring skills' and stated that the Appellant was 'still undergoing a transitional phase where she may reach this balance eventually'. The comment by the Deputy Chief of the Evaluation Branch indicated that the Appellant 'would benefit from training in English writing and editing' and 'should acquaint herself with the relevant aspects of UNFPA policies and programmes'. The MRG referred to the Appellant's 'lack of familiarity with UNFPA policies and programme approaches', and advised that the Appellant should 'improve her output qualitatively' and that 'significant progress needed to be made to bring her performance to an acceptable level'.

(b) In the 1992 PAR, although the Appellant received a rating of (3) from her supervisor and the MRG and improvements were noted in her performance, the Panel [noted] several comments by her supervisor suggesting that there was 'still room for improvement' in her written work, e.g., '[h]er written output has improved in quality, although there is still room for improvement'; '[t]he ultimate products

still vary significantly in quality from case study to case study but the discrepancies would have been even more drastic without her intervention'.

(c) In the Appellant's 1993 PAR, 'inconsistency' in the quality of her written outputs was cited as a primary reason for finding that her performance did not meet expectations in full, i.e., a rating of (4). The MRG 'noted that the quality of [the Appellant's] work was inconsistent and her performance uneven'.

32. During the hearing, the Panel had the opportunity to hear the Appellant's supervisor describe the Appellant's work during 1992 and 1993, and elaborate on the quality of the Appellant's performance. The Appellant's supervisor further explained her reasons for having given the Appellant's performance a rating of (4) in 1993.

33. The Panel carefully reviewed the Rebuttal Panel's report of 24 August 1994 and heard from two of the members of the Rebuttal Panel. Although the Rebuttal Panel had recommended that the MRG upgrade the Appellant's rating, such recommendation was based on the insufficiency of the evidence to support the lower rating, i.e., the lack or inadequacy of documentation on (i) the results of the Appellant's 1993 mid-term review, (ii) an elaborated performance plan or training programme or (iii) variations in the quality of the Appellant's work. It was thus the absence of documentation to demonstrate the inadequacy, rather than evidence of the quality and adequacy, of the Appellant's performance that was the basis for the Rebuttal Panel's recommendation.

34. The Panel considered the efforts over the past four years by the Appellant and the Organization to support the Appellant's professional development. In this regard, the Panel noted that the Appellant had taken, as had been recommended, various seminars and workshops, and was pursuing a doctorate degree in a field relevant to her work. In addition, the Appellant's supervisor explained her efforts to work with the Appellant to improve the Appellant's written work product. Despite such efforts, based on the supervisor's testimony and the Appellant's PARs, the Appellant's performance was not found to meet the performance expectations in full.

35. Based on the foregoing, the Panel concluded that, as early as 1991, it appeared that the Appellant may not have possessed all of the skills required for the P-3 Evaluation Officer post. Since then, there had been genuine efforts on

the part of the Appellant and the Organization to assist her to acquire the skills necessary to perform the functions of the post. Nevertheless, her supervisor and the MRG found that the Appellant's 1993 performance did not satisfy some of the performance expectations. In reaching its conclusion, the PAR guidelines (paragraph 58) require the MRG to consider the Rebuttal Panel's report and recommendation, which was done by the MRG in this case, but do not require the MRG to accept the recommendation of the Rebuttal Panel. In sum, the Panel found no evidence that (i) the supervisor's rating of the Appellant's performance or (ii) the MRG's decision to maintain such rating was arbitrary or based on discrimination, prejudice or other improper motive.

36. According to the PAR guidelines (paragraph 33), if a staff member's performance receives [two successive (4) ratings], UNFPA has several options, including separation of such staff member from UNFPA service. Moreover, after four years of fixed-term employment, UNFPA usually considers a staff member for a probationary appointment which 'is normally of six months' duration' and, '[i]f the recommendations ... are positive, the probationary appointment is converted to a permanent appointment ...' After four years of fixed-term appointments, the MRG met and determined not to renew the Appellant's fixed-term appointment. The Panel found no evidence that this decision was arbitrary or based on discrimination, prejudice or other improper motive.

37. As had been pointed out by the Rebuttal Panel, when a staff member's performance is rated as (4), the PAR guidelines (paragraph 32) require the supervisor 'to keep track of specific critical incidents of poor performance and behaviour as well as clear instances of improvement, to help the staff member understand in precise terms those areas where performance requires improvement.' Further suggestions are made regarding more frequent interim reviews and a more elaborate Performance Plan. The Panel found that documentation of critical incidents of poor performance, and of the efforts to address such incidents, was lacking and would have been useful to substantiate the decisions taken by the Appellant's supervisor and ultimately by the MRG. In particular, the Panel noted the absence of documentation regarding the Appellant's 1993 mid-term appraisal. In addition, the Panel was disturbed that UNFPA (and thus the Appellant) did not have a current post description outlining the duties and responsibilities of a P-3 Evaluation Officer.

Recommendation

38. Based on the foregoing considerations, the Panel makes no recommendation in support of the appeal."

On 3 February 1995, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report and noted its finding that the decision not to renew your appointment was not arbitrary or based on discrimination, prejudice or other improper motive; and, that it made no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on your case."

On 15 June 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legitimate expectancy of further employment after the expiration of her fixed-term contract.

2. The Respondent's decision not to extend the Applicant's contract was tainted by prejudice, caprice and lack of due process.

Whereas the Respondent's principal contentions are:

1. The Applicant has failed to establish any basis for her claim that she had an expectancy of renewal of her fixed-term appointment.

2. The UNFPA MRG properly evaluated the Applicant's performance.

3. The Applicant has not adduced evidence of prejudice or lack of due process in the decision not to extend her appointment.

The Tribunal, having deliberated from 4 November to 21 November 1996, now pronounces the following judgement:

I. The Applicant worked as an Evaluation Officer at the P-3 level at the United Nations Population Fund (UNPFA) since 1990 under a series of fixed-term appointments. On 14 February 1995, the Applicant was separated from service. During her period of service with UNFPA, the Applicant received three periodic performance appraisal reports (PARs) which assessed the Applicant's performance for the years 1991, 1992 and 1993. The Applicant's PAR for 1991 indicated a rating of (3) - "meets the expectations of the performance plan" which was, however, downgraded by the Management Review Group (MRG) to a rating of (4) - "meets some of the expectations of the performance plan but performance needs improvement". For the year 1992, she received a rating of (3). For 1993, she received a rating of (4).

II. Following the 1993 rating, the Applicant requested a formal rebuttal investigation. This resulted in the Rebuttal Panel recommending that the MRG upgrade the PAR. However, on 10 October 1994, the MRG informed the Applicant that they rejected the Panel's recommendation and maintained the rating of (4). They also advised the Applicant that her service "ha[d] not in all respects met the standards and requirements of UNFPA" and therefore her fixed-term appointment was not renewed. Thereafter, the Applicant appealed to the Joint Appeals Board (JAB) who did not support the Applicant's appeal and whose recommendations were accepted by the Secretary-General.

III. The main issue in the case is whether the non-renewal of the Applicant's fixed-term contract with UNFPA violated her rights. The Applicant argues that the decision by UNFPA not to renew her

contract was arbitrary and tainted with prejudice. She asks the Tribunal to reinstate her retroactively from 14 February 1994 and to compensate her for material and moral injuries.

IV. At the outset the Tribunal will deal with the Applicant's request for the production of documents. It appears to the Tribunal that the documents and information sought are not relevant. Therefore, this request is rejected.

V. The Applicant contends that she had an expectancy of renewal of her contract. She cites in support of her case, Judgement No. 345, Najjar (1985), which holds that in determining fixed-term appointments three considerations are taken into account: the record of performance, the need for continued service and the availability of suitable posts. The Tribunal is of the view that this case does not support the Applicant's argument. It is clear from the facts that the Applicant did not satisfy at least one of these considerations, as her record of performance was considered weak. In addition, the Applicant cites Judgement No. 142, Bhattacharyya (1971). From that case, it is clear that consideration of the renewal of a staff member's contract must involve factors other than the mere expiration of the fixed-term contract. Here too, the Tribunal concludes that this judgement does not support the Applicant's case. The basis of the non-renewal of the Applicant's contract was not the expiration of her fixed-term contract but the inefficiency in her work performance. Therefore, the Director had linked the Applicant's termination to a specific cause.

VI. The Tribunal finds it surprising that the Applicant would have expected a renewal of her contract. She was fully aware that her performance had been rated at (4) for the second time. Moreover, as early as 1991, the MRG advised the Applicant that she should "improve her output qualitatively" and that "significant

progress needed to be made to bring her performance to an acceptable level". Once again, in 1992, the Applicant was informed that "there is still room for improvement".

Paragraph 32 of the PAR guidelines specifies that if the staff member's performance "continues to be lacking and the staff member is rated a second time in this category [(4)] ... these steps may be taken ... (b) separation from ... service".

Accordingly, the Tribunal rejects the contention that the Applicant had an expectancy of renewal.

VII. The Applicant asserts that the MRG's rejection of the Rebuttal Panel's recommendation was unfounded and that the MRG provided only a "flimsy" explanation for its rejection. The guidelines for the PAR provides inter alia:

> "37. The main purposes of the MRG are to:
>
> a. Review and approve narrative appraisals and performance ratings by supervisors to ensure consistency and fairness ...
>
> b. Propose staff for promotion through the existing Appointment and Promotion machinery.
>
> ...
>
> 44. ... [T]he quality of the [MRG] narrative in section 10 is important because the staff member learns how managers view him or her in addition to the immediate supervisor. The narrative feedback must reflect accurately and comprehensively the MRG's deliberations. This is important for staff at any level of performance including those at the (3) rating level ..."

The Tribunal considers that the MRG followed the above guidelines and endorsed the rating of (4) that was given to the Applicant by her supervisors, stating that the Applicant's work was inconsistent and her performance uneven. The Tribunal considers this explanation was justifiable and not at all flimsy. In addition, the MRG carefully reviewed the recommendation of the

said, inter alia, "I now consider that letter from the past and let bygones be bygones. I therefore intend to open a new chapter promising to cooperate fully with all my superiors especially my direct superior, [the A/CERO]." This can only mean, in the view of the Tribunal, that he not only retracted many, if not all, of his accusations against the Respondent, but also agreed to cooperate with his supervisor, the A/CERO.

VI. The Tribunal also notes that the Applicant was given a further chance to improve his prospects. An examination was held to fill the vacancy resulting eventually from the retirement of the regular CERO of Deir-el-Balah Distribution Office. The Applicant claims that he came first in this test, but the record shows that this was not so.

From 17 April 1994, when the Applicant was told why he had not been selected for the vacant job of CERO of Deir-el-Balah Distribution Office, his conduct and performance improved. This opinion was given by the A/CERO who had previously complained about his lack of cooperation and his insubordination. However, the evidence shows that the favourable message written by the A/CERO on 2 May 1996 was "because he was blamed by people who told him not to be the one who could cause [the Applicant's] separation from the Agency." That some such pressure or duress was at the back of the A/CERO's apparent change in attitude was further confirmed by the A/CERO's comments in subsequent documents. The instances of breaches of discipline and insubordination for which the Applicant's services were terminated all occurred well before the examinations of April 1994.

VII. The Joint Appeals Board (JAB) enquired into the Applicant's complaints and unanimously recommended "to uphold the Administration's decision to terminate the Appellant's service in

the interest of the Agency under Area staff rule 109.1; and that the case be dismissed."

The Tribunal accepts the finding of the JAB and has not found that the Applicant produced any reliable evidence to establish prejudice or bias on the part of the Respondent in the action taken against the Applicant.

VIII. In view of the above, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/807
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 807

Case No. 917: LEHMANN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 27 March 1996, Ingrid A. Lehmann, a former staff member of the United Nations, filed an application containing, inter alia, the following pleas:

"(a) That the Secretary-General's decision to terminate her permanent appointment on the ground of incapacity for further service by reasons of health was without basis and totally invalid;

(b) That the Secretary-General was well aware of the absence of proof of incapacity for further service and that his decision was arbitrary, capricious and with calculated malice;

(c) That the Secretary-General's decision was in violation of the letter and spirit of staff regulation 9.1(a) and in clear violation of personnel directive 3/80 and article 33(a) of the United Nations Joint Staff Pension Fund Regulations;

(d) That the Secretary-General's arbitrary and merciless decision resulted in her loss of employment for a least 13 more years and loss of pension accumulation for the same period, and that the autocratic and arbitrary measure of bypassing the Pension Fund Committee has wantonly and irresponsibly deprived the Applicant of a

disability benefit payable to staff members who are genuinely incapacitated for further service;

(e) That the Secretary-General should rescind the termination of the Applicant and reinstate her in the position in which she was at the time of the purported separation;

(f) That such reinstatement should automatically restore all her rights and entitlements as a staff member, including health insurance coverage retroactively to the date of purported separation and the right to sick leave in accordance with staff rule 106.2;

(g) That, should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations to pay compensation in lieu of specific performance, the Applicant prays that the Tribunal order an amount of compensation that would take into account the loss of salary, including the pension factor, loss of sick leave on full pay and sick leave on half pay under article 106.2(iv) of the Staff Rules (i.e. 9+9 months), and loss of disability benefit effective the date of separation;

(h) That this be considered an exceptional case justifying the payment of higher indemnity under article 9.1 of the Statute of the Administrative Tribunal, for the following reasons:

(i) ... [the] Under-Secretary-General for Administration and Management [USG/A&M] wrote to the Applicant on 1 March 1995 advising her of the termination decision 'effective immediately'.

(ii) In his capacity as USG/A&M and with the availability of high calibre legal advice, he knew or should have known that his decision was arbitrary and totally devoid of any legitimate or legal basis.

(iii) The deliberate circumvention of the Pension Fund Committee by the USG/A&M because of full knowledge that the case did not meet the criteria for termination for incapacity by reasons of health is a clear indication of bad faith and constitutes a gross abuse of authority.

...

(viii) The negative and obstructionist attitude of the Respondent has dragged the administration of justice procedure on for nine more months.

..."

Whereas the Respondent filed his answer on 6 August 1996;

Whereas the Applicant filed written observations on 28 August 1996;

Whereas, on 22 October 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 May 1975, as an Assistant Officer, on a probationary appointment at the P-1, step VI level, in the Executive Office of the Secretary-General (EOSG). On 22 January 1976, the Applicant's appointment was retroactively changed to that of Associate Officer, at the P-2, step I level. On 1 May 1977, she was granted a permanent appointment. On 1 April 1978, the Applicant was promoted to the P-3 level, as Second Officer. On 6 January 1979, she was detailed to UNFICYP in Cyprus. Her functional title was changed to Political Affairs Officer. On 1 July 1979, she was transferred to the Treaty and Resolution Section, Centre for Disarmament, Department of Political and Security Council Affairs. She was promoted to the P-4 level on 1 November 1980, in the Office of the Assistant Secretary-General for Disarmament.

With effect from 1 January 1984, the Applicant was reassigned to the Coordination and World Disarmament Campaign Branch, Department of Disarmament Affairs and, on 1 February 1984, she was outposted from New York to the Geneva Branch.

On 1 February 1985, the Applicant was transferred to the Department of Public Information (DPI), at Headquarters, as Chief of the Non-Governmental Organizations Section, External Relations

Division. With effect from 1 April 1985, she was promoted to the P-5 level. On 15 September 1988, she was reassigned, within DPI, to the Peace and Security Programme Section, Communications and Project Management Division.

The Applicant was temporarily assigned to UNTAG, Namibia from February 1989 through March 1990.

On 1 June 1991, the Applicant was reassigned to the Information Centres Division, DPI, as Director, UN Information Centre (UNIC), Washington, D.C. On 1 December 1991, she was promoted to the D-1 level.

On 21 September 1992, the Under-Secretary-General, DPI, informed the Applicant that the Secretary-General had decided to reassign her to Headquarters, with effect from 31 October 1992, as a result of the "ongoing review process [which] entails movement of staff at Headquarters and the field". He noted that "follow-up discussions concerning your new assignment will take place upon your return".

On 9 October 1992, the Under-Secretary-General, DPI, informed the Applicant that "it was decided by the Secretary-General that you will be reassigned as Director, UNIC, New Delhi". In a note dated 9 October 1992, the Assistant Secretary-General, DPI, indicated that it had been agreed that the Applicant would report for duty in New Delhi by mid-November 1992. In a letter dated 23 December 1992, the Permanent Mission of India to the United Nations informed the Secretary-General that the Government of India had no objection to the Applicant's appointment as Director of the UNIC in New Delhi.

On 1 March 1993, the Applicant's physician informed the Director, Medical and Employee Assistance Division (hereinafter the UN Medical Director) that the Applicant had been under his care since 29 October 1992 and was suffering from a "major depression, single episode, without psychotic features". He attached a report on the Applicant's condition by a clinical psychologist who was also treating the Applicant. He noted that "the traumatic fashion in

which [the Applicant] was informed of her reassignment coupled with the requirement that she wrap up all her personal affairs within a very brief period were major contributing factors in precipitating a severe reactive depression".

On 6 May 1993, the UN Medical Director informed the Assistant Secretary-General, DPI, that the Applicant was "at present not medically fit for an assignment in New Delhi or any similar position. She is still under medical treatment, but should be able to come back to work at Headquarters by the end of the month".

On 7 May 1993, the Assistant Secretary-General, DPI, wrote to the Executive Officer, DPI, stating as follows:

> "I would suggest when [the Applicant] comes back to work on 1 June, you find ways of using her in Headquarters. We will decide then whether to maintain her appointment to New Delhi or not".

In a letter dated 5 June 1993, the Applicant's physician informed the UN Medical Director that the Applicant's recovery was "quite fragile". He noted inter alia: "At this point in [the Applicant's] recovery, a posting to New Delhi is likely to seriously jeopardize her health and result in a return in full force of her depressive illness".

According to the record, the Administration explored the possibility of assigning the Applicant to head the UNIC in Vienna. On 9 September 1993, the UN Medical Director indicated that "there is no medical contraindication in regard to [the Applicant's] transfer to Vienna".

On 15 September 1993, the Applicant sought special leave without pay for one year, from 18 October 1993, to attend Harvard University, pending the resolution by the Respondent of certain administrative problems relating to her transfer to Vienna. In her letter, the Applicant noted that "should the obstacles related to my

posting to Vienna be overcome in the near future, I would be prepared to cut short my participation in the Harvard University Programme".

On 6 October 1993, the Chief of Staff, EOSG, wrote to the Assistant Secretary-General, DPI, indicating that an Information Centre should be opened as soon as possible in Bonn. He noted that the staff member encumbering the post of Director of the UNIC in Vienna should be reassigned to Bonn with effect from 1 November 1993 and "the consequent assignment of [the Applicant] to Vienna should take place immediately thereafter".

On 11 October 1993, the Assistant Secretary-General, DPI, wrote to the Applicant stating that, since arrangements had been finalized with the German Government concerning the Information Centre in Bonn, he authorized her special leave without pay "beginning 18 October, provisionally through 29 October". She was then to report to Headquarters on 1 November and be prepared to report to Vienna on 8 November, to coincide with the departure of the incumbent.

The Applicant reported to Headquarters on 1 November, but returned to Harvard University since arrangements for her assignment to Vienna had not been finalized. Her leave was subsequently extended until 31 August 1994.

On 9 September 1994, the Applicant recorded in a "Note for the Record" that, during conversations that had taken place with the Assistant Secretary-General, DPI, and his Special Assistant concerning her next posting, "it was agreed that it would be a field posting as Head of a United Nations Information Centre, as soon as possible". She stated that she had agreed to a post as Head of the Information Centre in Athens, which had been vacant for some time, "until Vienna is vacated". She also agreed to the timing of such posting, "prior to UN Day 94" in view of the fact "that UNIC Vienna is still not available".

In a Note for the Record dated 14 September 1994, the Assistant Secretary-General, DPI, noted that he had informed the Applicant that "she is being seriously considered to head UNIC Athens in the absence of any other appropriate alternative". He noted: "It is recalled that [the Applicant] had been scheduled to proceed to UNIC Delhi, but declined on medical grounds at the time". In a reply of 22 September 1994, the Applicant confirmed that she was "ready to take on [the Athens] assignment as soon as possible".

On 22 September 1994, the Assistant Secretary-General, DPI, wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), as follows: "Although the Medical Director had informed DPI verbally that [the Applicant] could now take up her duties there [in New Delhi], you may wish to confirm whether she should go to New Delhi. If not, we will then have to explore the possibility of sending her to another UNIC, for example, UNIC Athens, where the Director's post is vacant." In a reply dated 24 September 1994, t'e UN Medical Director indicated that "Based on our present information, [the Applicant] is fit to start the proposed assignment."

In a note dated 26 September 1994, the Assistant Secretary-General, DPI, informed the Applicant that, after the Secretary-General's return from New Delhi, he had decided to maintain the post of Head of the Information Centre at the D-1 level. Accordingly, since it had not been possible to place her in a suitable position, "[a]fter consulting with the Chief of Staff, EOSG, and the Director of Personnel, it has been decided that, as the previously selected candidate for the post and the one cleared by the host Government, you should be given another opportunity to move to New Delhi without delay".

By a memorandum dated 28 September 1994, the Applicant asked the Assistant Secretary-General, DPI, to explore other possibilities regarding her placement. She expressed her disappointment over the most recent delay in the finalization of her transfer to Athens,

which was scheduled to be effected "prior to UN Day". She suggested two possible positions at Headquarters for which she would be suitable. She also referred to the "significant stress over the manner in which I was removed from [the Washington UNIC post]". On 28 October 1994, the Assistant Secretary-General, OHRM, requested the Applicant to report for duty in New Delhi no later than the week beginning 7 November. He stated that he had confirmed with the UN Medical Director that she was "considered medically fit for transfer to New Delhi".

On 1 November 1994, the Applicant's treating specialist advised the UN Medical Director against reassigning the Applicant from New York. The UN Medical Director requested the Applicant to submit to another medical exam by a specialist chosen by the UN. The Applicant did so. The report of the second specialist concurred with the report of the Applicant's treating specialist. Accordingly, on 5 December 1994, the UN Medical Director wrote to the Assistant Secretary-General, DPI, advising that the Applicant was not fit for any overseas assignment at the present time. On 6 December 1994, the Assistant Secretary-General, DPI, wrote to the Assistant Secretary-General, OHRM, noting that the Applicant "is not medically fit for any overseas assignment at present" and requesting that "OHRM explore other possible assignments for [the Applicant] within the Secretariat ..." However, by a memorandum to the Applicant dated 29 December 1994, the Assistant Secretary-General, OHRM, informed her that "the Medical Service has thoroughly reviewed the matter and has found that there are no contraindications for your transfer to Athens, Greece. [The Assistant Secretary-General, DPI] is fully supportive ..." The memorandum requested that the Applicant report to Athens on 1 February 1995. On 11 January 1995, the Applicant noted that this decision contradicted the UN Medical Director's opinion that she was not fit for an overseas assignment.

In a memorandum dated 26 January 1995, the Assistant Secretary-General, DPI, asked the Assistant Secretary-General, OHRM,

for his "immediate assistance in identifying for and placing [the Applicant] in an alternative assignment and post at Headquarters outside of DPI. Failing that, I would support any alternative courses of action that can be pursued which OHRM deems appropriate and feasible".

According to the report of the Joint Appeals Board (JAB), on 22 February 1995, the Applicant met with two senior staff members of OHRM, who informed her that her appointment would be terminated for reasons of health under staff regulation 9.1, but that she might wish to consider the alternative of an agreed termination. The Applicant was provided with calculations of her entitlements under the two proposals.

By a letter from the Under-Secretary-General for Administration and Management dated 1 March 1995, the Applicant was terminated under staff regulation 9.1(a) for reasons of health. The Applicant was informed as follows:

> "As you know, since your departure from the United Nations Information Centre in Washington, several suitable positions have been identified for you in a number of countries. However, you were unable to obtain the necessary medical clearance to take up your duties in any of those countries.
>
> Under the circumstances, and since the only positions available were in Europe and Asia, for which you lack medical clearance, the Secretary-General has decided to terminate your appointment under staff regulation 9.1(a) for reasons of health because you have been deemed incapacitated for service in the only posts available and suitable for your qualifications and experience.
>
> You will receive the termination indemnity to which you are entitled in accordance with Annex III to the Staff Regulations and compensation in lieu of notice in accordance with staff rule 109.3(c)."

On 1 March 1995, the Applicant sought a suspension of the administrative decision to separate her from service. Not having

received a negative reply. On 14 April 1995, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 8 February 1996. Its considerations, conclusion and recommendations read, in part, as follows:

"...

41. The Panel ... noted that, PD/3/80 is intended ... to regulate the procedure for determining whether a staff member is for reasons of health incapacitated for further service and as a result should receive a disability benefit under ... article 33 of the Regulations of the UNJSPF [United Nations Joint Staff Pension Fund]. Such a determination can be made only by the UNJSPC [United Nations Joint Staff Pension Committee] under article 33 of the Pension Fund Regulations. It is that determination which must precede termination by the Secretary-General of an appointment on health grounds.

42. The Panel could not accept the theory that cases of 'first impression' should be dealt with otherwise than in accordance with the Regulations and Rules, including Personnel Directives.

Conclusion

43. ... the Panel found that PD/3/80 was applicable to the case. It could find no support for the distinction between cases of 'total incapacity' and others, particularly as that term did not appear in article 33 of the Pension Fund Regulations. It agreed with Appellant's contention that failure to comply with its provisions was a violation of her rights under the Staff Regulations and Rules and a denial of due process.

Recommendation

44. The Panel unanimously recommends that as Appellant's termination of appointment on health grounds did not conform to the statutory requirements, the Secretary-General should rescind it. He should reinstate the Appellant in the position in which she was at the time of the purported separation. Such reinstatement should automatically restore her rights to health insurance coverage retroactively and to

whatever other entitlements were applicable to her in her status prior to separation, including the right to sick leave in accordance with staff rule 106.2.

45. If the Secretary-General feels, at any time, that the conditions justifying separation on health grounds are present, he should submit the case to the UNJSPC, in accordance with PD/3/80.

46. As regards Appellant's claim for damages, the Panel felt that if its recommendations are carried out, the Appellant will have received full restitution of her rights. It therefore does not make any recommendation for the award of damages at this time."

On 27 March 1996, the Applicant filed with the Tribunal the application referred to above.

On 3 June 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the conclusions of the Panel regarding personnel directive PD/3/80 and its relevance to your case and to your rights. He has further noted the Panel's recommendation that the decision to terminate your appointment should be rescinded and that you should be reinstated with retroactive rights. He has also noted the Panel's comments regarding the submission of your case to the U.N. Joint Staff Pension Committee and that the Panel made no recommendation in favour of an award of damages to you at this time.

The Secretary-General has given careful consideration to these conclusions and recommendations. He has also noted that, in the final consideration of the Panel's report, the Panel did not refer to the difficult position in which the Administration was placed by your health situation or to the Administration's efforts to find a new posting for you and to accommodate your health situation in this search. The fact remains that your health situation, the need for a 'stress free' position at the D-1 level at Headquarters in New York, and the failure to find such a position, was the factor which led to the decision to terminate your appointment.

The Secretary-General has decided to maintain the contested decision to terminate your appointment, and to take no further action in your case. The factor leading to your termination stated above is now reinforced as the current early separation and redeployment exercise at the United Nations makes it even more unlikely that a 'stress free' D-1 position could be found for you at Headquarters.

In regard to the submission of your case to the United Nations Joint Staff Pension Committee, the Secretary-General notes that under Section H.4 of the Administrative Rules of the United Nations Joint Staff Pension Fund you have a right to request a disability benefit and that Section K of those Rules contains procedures for resolution of disputes as to your state of health."

Whereas the Applicant's principal contentions are:

1. The Secretary-General's decision to terminate the Applicant's contract was in violation of the letter and spirit of staff regulation 9.1(a) as well as in clear violation of personnel directive 3/80 and article 33(a) of the UNJSPF Regulations.

2. The Secretary-General's decision to terminate her permanent appointment on the ground of incapacity for further service by reasons of health was without basis and totally invalid.

Whereas the Respondent's principal contentions are:

1. As the Applicant was medically fit only for assignments to "stress free" jobs located only in New York - and no such jobs are available - the Applicant was properly separated on 1 March 1995.

2. The crux of the case therefore is the medical condition of the Applicant, which can be determined only if she makes an application to the United Nations Joint Staff Pension Committee for a disability benefit.

The Tribunal, having deliberated from 21 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General dated 3 June 1996, rejecting the recommendation of the Joint Appeals Board that "as Appellant's termination of appointment on health grounds did not conform to the statutory requirements, the Secretary-General should rescind it. He should reinstate the Appellant in the position in which she was at the time of the purported separation."

Staff regulation 9.1(a), under which the Respondent purported to terminate the Applicant's appointment, provides that "the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of staff, if the services of the individual concerned prove unsatisfactory, or if he or she is, for reasons of health, incapacitated for further service".

The letter of 1 March 1995, which gave notice of termination, informed the Applicant that she would receive a termination indemnity in accordance with Annex III of the Staff Regulations, and compensation in lieu of notice in accordance with staff rule 109.3(c).

The Applicant seeks rescission of the decision to terminate her appointment, and claims that the decision was in violation of the letter and spirit of staff regulation 9.1(a) and in clear violation of personnel directive 3/80 and article 33(a) of the United Nations Joint Staff Pension Fund (UNJSPF) Regulations.

II. Paragraph 4 of personnel directive 3/80 provides " When the Medical Director, subject to paragraph 5, has reached the conclusion that the staff member's illness constitutes an impairment to health which is likely to be permanent or of long duration, he will so advise the Personnel Officer who will immediately prepare an appropriate presentation to the United Nations Joint Staff Pension Committee ..." Paragraph 6 of personnel directive 3/80 provides

"[t]he action of the United Nations Joint Staff Pension Committee is governed by the UNJSPF Regulations and Rules. Following consideration of the presentation of the Personnel Officer and the advice of the Medical Director, the Committee will determine whether or not the staff member is incapacitated within the meaning of article 34(a) of the UNJSPF Regulations. The Committee will advise both the staff member and the Personnel Officer concerned of its determination".

The Respondent did not forward the Applicant's case to the United Nations Joint Staff Pension Committee (UNJSPC), because in his view, the terms of the UN Medical Director's opinion made it difficult to conclude that the Applicant was incapacitated for further service reasonably compatible with her abilities in a Member Organization (article 33(a) of the UNJSPF Regulations).

The Respondent's contention, that the Organization did not submit the Applicant's case to the UNJSPC because the Medical Director's opinion made it difficult to conclude that the Applicant was incapacitated for further service reasonably compatible with her abilities in a Member Organization, seems to the Tribunal to call into question the validity of the Respondent's termination of the Applicant's service on health grounds. Although the Respondent seeks to introduce the element of failure to find a suitable position as a reason for termination, the fact remains that the purported termination was on health grounds under staff regulation 9.1(a). Given this premise, there is no validity in the Respondent's argument that the matter was not referred to the UNJSPC because, in effect, the Medical Director's opinion might not substantiate incapacity. Nor is there validity in the contention that failure to find a suitable position was the basis of the termination.

III. The Respondent further argues that the Applicant could have referred the matter herself to the UNJSPC and sought a determination

that she was entitled to a disability benefit if the UN did not send such a request to the UNJSPC.

Paragraph H.4 of the Administrative Rules of the UNJSPF provides that a determination under article 33(a) shall be made by the staff pension committee at the request of a participant:

> "(a) Whenever the organization has not acted in accordance with rule H.3 above; or
>
> (b) Whenever a participant alleges that on the date of separation he was incapacitated within the meaning of article 33(a)."

These provisions would have placed an obligation on the Applicant to request a determination, inter alia, if she was of the view that she was incapable of work. This, clearly, was not her view. On the contrary, her position was that she could have continued in the service of the Organization. She was not obliged to seek a determination.

IV. The Respondent challenges the status of the Personnel Directive, contending that it is not, stricto sensu, a legislative instrument, but a directive to Personnel Officers, setting out, for guidance purposes, the general procedures that should be followed in given circumstances. The Tribunal does not accept the Respondent's contention that this Personnel Directive has no bearing on the case.

The purpose of the Personnel Directive is, indeed, to give guidance regarding personnel policies and procedures to be followed in the application of the Staff Regulations and Rules. The Tribunal is of the view that the Personnel Directive was brought into being for a particular purpose and cannot be ignored. The Personnel Directive and the Rules and Regulations are interrelated, and must be applied in conjunction with each other.

V. The Respondent asks that the Tribunal find that, as the Applicant has sought compensation measured by reference to her entitlement to a disability benefit, she must first apply for a disability benefit and obtain a final decision on that request, prior to having the Tribunal rule on her entitlement to compensation based on such disability benefit. The Respondent regards this case as premature and, therefore, believes that it should be dismissed, or alternatively, that the case be remanded until a decision is made on the Applicant's right to a disability benefit.

A request to the Tribunal for compensation measured by reference to disability benefits must be preceded by a denial of those benefits. The Applicant, following treatment, is now in good health. Therefore, the Respondent's contention fails on practical grounds. It is also unacceptable that the Respondent should select a mere section of the Applicant's claim and seek, on that basis, to preclude a hearing of the appeal by the Tribunal.

VI. The Respondent failed to observe proper procedures and, in so doing, denied the Applicant due process. The Applicant, who had a distinguished record of service and who was having some difficulties with her health, was subjected to distressing and unwarranted treatment at the hands of the Organization.

VII. For the foregoing reasons, the Tribunal:

1. Finds in favour of the Applicant and orders the rescission of the decision of the Respondent, dated 3 June 1996, to terminate the Applicant's permanent appointment;

2. Orders that the Applicant be reinstated in a position with the same grade and at the same step which she held when she was separated, with full payment of salary and emoluments from the date of her separation from service, less her earnings from other employment, if any;

3. Should the Secretary-General, within 30 days of the notification of this judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the compensation to be paid to the Applicant at three years of her net base salary.

In so doing, the Tribunal finds, in accordance with article 9 of its Statute, that this case is exceptional, for the reasons stated above, namely that the Respondent, when terminating the appointment, failed to observe the procedures set forth in the Staff Rules and Regulations and denied the Applicant due process. The Respondent failed to follow the procedures laid down for dealing with separations on health grounds, despite repeated requests by the Applicant that he should do so. The Applicant was left, for an unconscionably long period of time, without financial resources from either the Organization or the Pension Fund, thus causing excessive hardship to the Applicant.

VIII. All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary